

No. 14669

United States
Court of Appeals
for the Ninth Circuit

LOUIS FLEISH,

Appellant,

vs.

E. B. SWOPE, Warden, U. S. Penitentiary,
Alcatraz, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

APR 18 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

LOUIS FLEISH, Pro Per,
Box 574,
Alcatraz, California.

LLOYD H. BURKE,
United States Attorney;

RICHARD H. FOSTER,
Assst. U. S. Attorney,
P. O. Bldg.,
San Francisco, California.

Attorneys for Respondent and Appellee.

In the United States District Court for the Northern District of California, Southern Division

Civil Action No. 34219

LOUIS FLEISH,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To: The Honorable Court.

Comes now Louis Fleish, petitioner herein, who claims to be held in unlawful restraint of his liberty, by E. B. Swope, Warden at the United States Penitentiary, Alcatraz, California, under color of authority of the United States, in violation of the Constitution, and laws of the United States, relying upon the reasons and facts as follows:

Jurisdictional Statement

1. This Court has jurisdiction under 28 U.S.C. 2241, et cetera.

Statement of Facts

2. On April 7, 1949, in the United States District Court at Detroit, Michigan, petitioner was found guilty of six (6) counts of a 27 count indictment charging violations of Title 26 U.S.C.A. 1132-1132q, 1934 Edition; that the Court imposed

5 years as to counts 1, 3, 12, 15, 18 and 21, to be served consecutively for a total of 30 years.

Allegation of Section 2255

3. The petitioner filed a Motion in the trial court under Section 2255 on July . . ., 1949, attacking the validity of the sentence by claiming that there was only one punishable offense and that the petitioner was only required to serve 5 years; that the Motion was overruled on September 16, 1949; that the United States Court of Appeals for the Sixth Circuit affirmed the judgment, and is reported at *U. S. v. Fleish, et al.*, No. 24766; that Section 2255 has proven inadequate to test the legality of the judgment and sentence; that this Court has jurisdiction to entertain the writ, relying upon the following case: *Wells v. Swope*, No. 33471 (1954) Northern District of California, Southern Division.

4. That the judgment order reads as follows:
- Count 1, Five (5) years;
 - Count 3, Five (5) years;
 - Count 12, Five (5) years;
 - Count 15, Five (5) years;
 - Count 18, Five (5) years; and under count 21, Five (5) years, said terms of imprisonment to run consecutively.

5. That the petitioner claims to be held in excess of the maximum authorized by law, by reason of the following facts:

I.

That the Judgment order fails to definitely

specify the order of sequence as to the execution of the several sentences; therefore, petitioner cannot be held in excess of the first 5 year sentence.

II.

That the mere designation in the Judgment order that the sentences are to be served consecutively (and not concurrently) for an aggregated term of 30 years does not clearly designate the sequence in which the sentences are to be served and the petitioner may avail himself of the writ.

III.

That the petitioner is entitled to immediate discharge because the judgment order fails to definitely designate the exact day when each sentence would become effective; that for the order to imply that the sentences are to be served consecutively to "Each Other" is vague and indefinite.

Cases Relied on

Mills v. Hunter,
204 F. 2d 468;

McNealy v. Johnston,
100 F. 2d 280;

United States v. Remis,
12 F. 2d 239;

Ziebart v. Hunter,
177 F. 2d 982;

Levine v. Hudspeth,
127 F. 2d 982;

Chasteen v. Denemark,
7 C.A.A., Nov. 1943;

People ex rel. Clancy v. Graydon,
160 NE 748;

United States v. Patterson,
29 F. 2d 775;

Howard v. United States,
75 F. 2d 986; 18 USC 3568.

6. That petitioner concedes that the court could impose consecutive sentences,

United States v. Solomon,
70 F. 2d 834;

Miketich v. United States,
72 F. 2d 550; 18 USC 3568.

6A. However, the Court is required to definitely specify the order of sequence as well as the precise day the sentences become effective, as to each other.

Relief Requested

The petitioner does not request to be present at the hearing because the records are all that are required. The petitioner respectfully requests that a prompt hearing be held and that the facts and law be determined solely by the records. The petitioner finally requests that he be discharged at once.

Respectfully submitted,

/s/ LOUIS FLEISH,

Petitioner in Propria Persona.

Dated: Nov. 1st, 1954.

Verification

State of California,
County of San Francisco—ss.

I, Louis Fleish, petitioner herein, hereby swear on oath that all I state herein above is true as to my knowledge and belief; that this 1st day of Nov., 1954, a copy of the above petition was mailed to: the United States Attorney, of the above court.

/s/ LOUIS FLEISH,
Affiant-Petitioner.

Subscribed and sworn to before me this 1st day of November, 1954.

[Seal] /s/ M. R. BERGEN,
Associate Warden.

Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed November 17, 1954.

In the United States District Court for the Northern District of California, Southern Division

No. 34219

LOUIS FLEISH,

Petitioner,

vs.

E. W. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER DISMISSING PETITION FOR THE WRIT OF HABEAS CORPUS

Petitioner, who has served some 15 years of a 30-year sentence consisting of six consecutive five-year terms, now seeks his release on the ground that the only valid portion of the sentence was the first five-year term. The remainder of the 30-year sentence is asserted to be void for uncertainty because the trial court, the United States District Court for the Eastern District of Michigan, in imposing the sentence upon six counts of an indictment, failed to specify the sequence in which the five-year terms should follow one another, and to designate the day upon which each term would begin to run.

Petitioner contends that this Court has jurisdiction to entertain this petition for a writ of habeas corpus because his motion to vacate the sentence, previously addressed to the trial court pursuant to 28 USC 2255, has proved ineffective to

test the legality of his detention. The motion to vacate was filed in the trial court in 1949, and denied 90 F. Supp. 273. The judgment denying the motion was affirmed on appeal. 181 F. 2d 1009. It appears both from the reports of the opinions of the trial and appellate courts upon the motion to vacate and from the present petition that the ground of the motion was that the six counts upon which petitioner was sentenced described only two offenses.

Thus the merits of the contention which petitioner makes in this petition has never been tested by way of motion pursuant to 28 USC 2255. This court is therefore without jurisdiction to entertain the petition, and it must be and is hereby dismissed.

Dated: December 11, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed December 14, 1954.

From: Louis Fleish,
Box No. 574.

Dec. 19, 1954.

Re: 34219 (Civil)

Hon. Louis E. Goodman, Judge,
U. S. District Court,
San Francisco 1, Calif.

Your Honor:

Please set aside your order of Dec. 14, 1954, because:

1. "A prisoner may be heard in habeas corpus to contend that he is being held in confinement after having fully served the sentence for which he was committed and 28 U.S.C. 2255, does not take away the right to urge such a question in habeas corpus."

(204 F. 2d at 470.)

Butterfield vs. Wilkinson,

(1954) 212 [215] F. 2d 320, (9 Cir.); 14035.

Brown vs. Hunter,

187 F. 2d 543, (10 Cir.)

Therefore, because the allegation in the petition is valid and because it now appears that I do "not" have to use 28 U.S.C. 2255, I respectfully request you to set aside your order of Dec. 14, 1954, and issue an order for my immediate release.

Truly yours,

/s/ LOUIS FLEISH,

Box No. 574,

Alcatraz, Calif.

[Title of District Court and Cause.]

AMENDED ORDER DISMISSING PETITION
FOR THE WRIT OF HABEAS CORPUS

Petitioner seeks a rehearing of his petition for the writ of habeas corpus which was dismissed by an order of December 11, 1954. The order of dis-

missal was made on the ground that petitioner's proper remedy was a motion addressed to the trial court pursuant to 28 USC 2255, and that therefore this Court was without jurisdiction to entertain the petition. Petitioner urges, however, that habeas corpus is an appropriate remedy, citing *Mills v. Hunter*, 204 F. 2d 468 (10 Cir. 1953) and *Butterfield v. Wilkinson*, 215 F. 2d 320 (9 Cir. 1954). I am still of the view that the question tendered by this petition should be presented to the trial court by motion pursuant to 28 USC 2255. However, inasmuch as it can be clearly determined from the face of the petition that the asserted grounds for relief are without merit, it is Ordered that the petition be and hereby is dismissed on the merits, as well as for lack of jurisdiction.

Dated: December 21, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed December 22, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name: Louis Fleish. Address: Box No. 574. City: Alcatraz. State: California. Violation of Sections: 1132e-1132d, Title 26 U.S.C.A., United States Code; Sentence of 30 years; A petition for Writ of Habeas Corpus was denied on the 14th day of

Petition for Writ of Habeas Corpus.

Order Dismissing Petition for the Writ of Habeas Corpus.

Motion in letter form to Set Aside Order Dismissing Petition.

Amended Order Dismissing Petition for the Writ of Habeas Corpus.

Notice of Appeal With Praecipe Transcript of Record and Points Relied On for Appeal attached.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of February, 1955.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14669. United States Court of Appeals for the Ninth Circuit. Louis Feish, Appellant, vs. E. B. Swope, Warden, U. S. Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: February 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.